

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**State ex rel. Roger Lee Harper,
Petitioner Below, Petitioner**

vs) **No. 11-1083** (Roane County 93-C-147 & 08-C-62)

**David Ballard, Warden,
Respondent Below, Respondent**

FILED

February 11, 2013
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Roger Lee Harper, by counsel, Dennis H. Curry, appeals the Circuit Court of Roane County's order entered on June 27, 2011, denying his motion for reconsideration of the circuit court denial of his petition for writ of habeas corpus. Respondent Warden Ballard, by counsel, Laura Young, filed a response in support of the circuit court's decision.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Rules of Appellate Procedure.

Petitioner was charged with two counts of first degree murder and one count of malicious wounding after an altercation wherein two victims were killed and one was wounded. Petitioner was committed to Weston State Hospital, where he was later found competent to stand trial and responsible for his criminal conduct. Petitioner sought the services of a second expert after his first expert rejected petitioner's contention that he suffers from intermittent explosive disorder. The motion for payment of the second expert's fees was denied. Petitioner was eventually found guilty of all three counts by a jury. Petitioner later filed a petition for writ of habeas corpus, and obtained yet another expert to bolster his claim that he was denied a meaningful defense at trial on the issue of whether he suffers from intermittent explosive disorder. The circuit court denied the petition. Petitioner then filed a motion for reconsideration of the denial of habeas relief which the circuit court denied.

Petitioner appeals the denial of his motion for reconsideration. "'A motion to vacate a judgment made pursuant to Rule 60(b), W.Va. R.C.P., is addressed to the sound discretion of the court and the court's ruling on such motion will not be disturbed on appeal unless there is a showing of an abuse of such discretion.' Syllabus Point 5, *Toler v. Shelton*, 157 W.Va. 778, 204 S.E.2d 85 (1974)." Syl. Pt. 1, *Builders' Serv. and Supply Co. v. Dempsey*, 224 W.Va. 80, 680 S.E.2d 95 (2009). Finally, "'[a]n appeal of the denial of a Rule 60(b) motion brings to consideration for review only the order of denial itself and not the substance supporting the underlying judgment nor the final judgment order.' Syllabus Point 3, *Toler v. Shelton*, 157 W.Va. 778, 204 S.E.2d 85 (1974)." Syl. Pt. 2, *Dempsey*, 224 W.Va. 80, 680 S.E.2d 95.

Petitioner argues that whether he suffered from intermittent explosive disorder was a jury question, and that he was denied a fair presentation of this defense by the trial court's denial of his request for a second expert. The State argues that petitioner is appealing only from the denial of his motion for reconsideration, and that he did not meet his burden under Rule 60(b) of the West Virginia Rules of Civil Procedure.

Our review of the record reflects no clear error or abuse of discretion by the circuit court. Having reviewed the circuit court's "Order Denying Reconsideration of Order Denying Amended Petition for Writ of Post-Conviction Habeas Corpus" entered on June 27, 2011, we hereby adopt and incorporate the circuit court's well-reasoned findings and conclusions as to the assignments of error raised in this appeal. The Clerk is directed to attach a copy of the circuit court's order to this memorandum decision.

For the foregoing reasons, we affirm the circuit court's order.

Affirmed.

ISSUED: February 11, 2013

CONCURRED IN BY:

Chief Justice Brent D. Benjamin
Justice Robin Jean Davis
Justice Margaret L. Workman
Justice Menis E. Ketchum
Justice Allen H. Loughry II

IN THE CIRCUIT COURT OF ROANE COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,
ex rel. ROGER L. HARPER
Petitioner,

v.

Case Nos. 93-C-147
and 08-C-62
Judge David W. Nibert

MIKE COLEMAN, WARDEN,
Mount Olive Correctional Center
Respondent.

ORDER DENYING RECONSIDERATION OF ORDER DENYING AMENDED
PETITION FOR WRIT OF POST-CONVICTION HABEAS CORPUS

This matter is before for the Court upon the Petitioner's Motion for Reconsideration of Denial of Amended Petition for Writ of Post-Conviction Habeas Corpus, filed May 24, 2010. On January 28, 2010, this Court entered a Final Order denying Petitioner's Amended Petition for Post-Conviction Habeas Corpus. Earlier the same day, both parties attended a Status Conference. The Petitioner, Roger Harper, appeared by counsel, Dennis Curry, and the Respondent, Mike Coleman, Warden, Mount Olive Correctional Center, by counsel Joshua Downey, Prosecuting Attorney in and for Roane County, West Virginia. After hearing the arguments of counsel, the Court DENIED the motion.

This Court, after maturely considering the Petitioner's current request, does overrule and deny the Motion for Reconsideration, and it is therefore **ORDERED** and **ADJUDGED** that the said Motion for Reconsideration of Denial of Amended Petition for Writ of Post-Conviction Habeas Corpus be DENIED for the reasons stated by the Court in the Final Order and for the following reasons:

1. "When a party filing a motion for reconsideration does not indicate under which West Virginia Rule of Civil Procedure it is filing the motion, the motion will be considered to be either a Rule 59(e) motion to alter or amend a judgment or a Rule 60(b) motion for relief from a judgment." *Pritt v. Republican Nat. Committee*, 210 W.Va. 446, 451, 557 S.E.2d 853, 858 (2001). If the motion is filed ten or more days after the circuit court's entry of judgment, it can only be addressed under Rule 60(b). *Id.*

2. Final Orders are reviewed under an abuse of discretion standard, underlying factual findings are judged by a clearly erroneous standard, and questions of law are subject to de novo review. *State ex rel. Dana December Smith v. McBride*, 224 W.Va. 196, 203, 681 S.E.2d 81, 88 (2009).

3. Regarding a claim of insufficient evidence in violation of the Due Process Clause, petitioners must show that "no rational trier of fact, viewing the evidence in the light most favorable to the prosecution, could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

4. Upon a motion for relief from a judgment, the court may relieve a party from a final judgment for: excusable neglect, newly discovered evidence, fraud, a judgment that is void, a judgment that has been satisfied, or any other reason justifying relief from the operation of the judgment if filed within one year after the judgment. *W. Va. Rules of Civ. Proc.*, Rule 60(b)

5. Excusable neglect considers danger of prejudice to the other party, length of delay and its potential impact on judicial proceedings, reason for delay that includes

whether it was within the reasonable control of the movant, and whether the movant acted in good faith. *Delapp v. Delapp*, 213 W.Va. 757, 584 S.E.2d 899 (2003).

6. No excusable neglect exists in the present case. The state would be prejudiced by having to re-litigate a stale issue, which was reasonably regarded by the trial court as an objective expert evaluation. No delay was involved in this Court's January 28, 2010 Final Order. The possible delay, which would have resulted from the defense's request for an additional expert three weeks before the initial trial, was solely within the control of the Petitioner. The Petitioner could have objected to the use or expert status of Dr. Smith, their chosen expert, far earlier in the proceedings to spare judicial time and resources. Furthermore, the defense could have attempted to demonstrate Mr. Smith's alleged bias to the jury. This court is circumspect about the good faith of the movant due to the lack of changed circumstance since this Court's previous Final Order, the late expert trial request, and Dr. Smith's objective testimony stating he considered Intermittent Explosive Disorder criteria, felt the Defendant met the exclusionary criteria, and therefore did not think the diagnosis was worth pursuing.

7. Void judgments are those that exceed the statutory requirements of the applicable law. *See State ex rel. Cox v. Boles*, 146 W.Va. 392, 397, 120 S.E.2d 707, 710 (1961). Some examples of void judgments are the denial of counsel (*Widmyer v. Boles*, 150 W.Va. 109, 144 S.E.2d 322 [1965]), sentences in excess of statutory maximum punishments (*State ex rel. Nutter v. Boles*, 150 W.Va. 93, 144 S.E.2d 238, [1965]), or if the trial court lacked in personam jurisdiction (*Leslie Equipment Co. v. Wood Resources Co., L.L.C.*, 224 W.Va. 530, 687 S.E.2d 109 [2009]).

8. Petitioner's conviction was decided within the confines of the law and is not void. The trial court's findings were reasonable and do not constitute an abuse of discretion. In the light most favorable to the prosecution, the Petitioner's allegation of insufficient expert evidence, in violation of the Due Process Clause, did not prove that no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. No other reasons justify relief from this Court's final judgment.

9. Additionally, claims that have been "previously and finally adjudicated," either on direct appeal or in a previous post-conviction habeas proceeding, may not form the basis for habeas relief. W.Va. Code § 53-4A-1(b); *See Also, Bowman v. Leverette*, 169 W.Va. 589 (1982).

10. In this case, the lack of the aforementioned 60(b) relief from judgment rationale indicates this matter was appropriately decided by this Court's January 28, 2010 Final Order.

Accordingly, it is ADJUDGED and ORDERED that Petitioner's Motion for Reconsideration of Denial of Amended Petition for Writ of Post-Conviction Habeas Corpus is hereby DENIED.

It is further ORDERED that the Clerk of this Court forward a copy of this order to (1) Joshua Downey, Prosecuting Attorney for Roane County, West Virginia; (2) Dennis Curry, Counsel for the Defendant; and (3) Roger Harper, Defendant.

ENTERED this the 24 day of June, 2011.

A TRUE COPY, CERTIFIED THIS THE

DEC 22 2011

Andrea Stackman
CLERK CIRCUIT COURT
ROANE COUNTY, WEST VIRGINIA

David W. Nibert
David W. Nibert, Judge
5th Judicial Circuit

Entered in C.O.B. No. 47 Page 147

this 27 day of June, 20 11

(94)